No. 480

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, APPELLANT

v.

NEW JERSEY CORPORATION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

MOTION FOR THE UNITED STATES TO PARTICIPATE IN ORAL ARGUMENT AS AMICUS

[redacted]

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 439

UNITED STATES OF AMERICA, APPELLANT

v.

THE BORDEN COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES IN OPPOSITION TO MOTIONS TO AFFIRM

The motions to affirm[1] rest on a misconception of the issues which have been litigated and of the question presented here for decision. For the prima facie violation of Section 2(a) found by the district court was "the published discount quotations of [appellees] which on their face show discriminations between the [appellees'] wholesale customers" (J.S. 27); the cost studies submitted by appellees were held to justify "the difference in prices described * * * in [appellees'] published discount quotations" (J.S. 36); and the question presented by this appeal is whether ap-

[1] While appellee Bowman has moved to affirm or dismiss, the jurisdiction of this Court to review the district court's final judgment dismissing the case is clear. See 15 U.S.C. 29; compare Rule 16(1)(a) of the Revised Rules of this Court with Rule 16(1)(b).

pellees' cost studies could exonerate the otherwise illegal discriminations found by the district court.[2] This question, however, involves not merely the factual issue whether the cost studies justify the price discriminations (as appellees attempt to frame it), but the broader legal issue whether the discriminations can be justified by cost studies which arbitrarily classify all chain stores as one class of purchasers, and all independent stores as a separate class.

1. The court below found that "Bowman published and followed * * * discount quotations which on their face discriminated between chain customers and independent stores. * * * With respect to Borden, plaintiff's evidence as embodied in the stipulations also shows price discrimination between chain and independents by means of published discount schedules" (J.S. 24–25). The cost studies offered to justify these discriminations were similarly based upon *a priori* distinctions between chains and independents. Borden's study placed all chains into one group and the independents into four broad groups based on volume of purchases. It then purported to show the cost of serving each group regardless of the varying volumes or methods of doing business of individual customers within any group. Bowman's study pur-

[2] That the government made out its prima facie case against Bowman on the basis of a sample group of nine stores does not alter the fact, despite appellee Bowman's suggestion to the contrary (pp. 9, 10), that the illegality shown was that of the entire pricing system. Moreover, the cost studies proffered by Bowman plainly show that it sought to justify its entire discount schedule and not merely the prices charged the nine sample stores.

ported to show the cost of doing business with any chain or any individual at any volume level, but the distinctions of cost between the two types of stores resulted from allocating to all the independents, but to none of the chains, fixed charges for optional customer services and collection costs regardless of whether these charges were incurred by a particular independent customer.

The Borden motion to affirm states (p. 8) that "the basic reason" for this classification was the fact that the "combined" volume of the Borden-served chains exceeded the "total sales made by Borden to all its 1,322 so-called 'independent'" customers. See also Bowman motion, p. 14. It is precisely this characteristic of appellees' cost studies that the government is challenging, since those studies show that *any chain* served by appellees received the maximum discounts while *no independent* could hope to reach so favored a position.[3] Unless appellees show that each of the chain customers was individually entitled, on the basis of lower costs of serving the chain, to receive the maximum discounts, and that none of the independents was entitled to a higher discount, the criteria which determined the discount to be given to particular customers plainly "rest[ed] upon an arbitrary classification of customers according to ownership" (J.S. 16).

[3] Borden's suggestion (p. 9) that other chains would not necessarily have received the same discounts ignores the fact that every chain served by Borden in fact received preferential treatment. No more need be shown to establish that Borden treated all chains as a separate classification of customers.

No such showing has been made by either appellee. Neither has shown that the two different chains which each of them served, and which received the same high fixed discount, purchased the same average volumes of milk for their stores, or that the same methods of sale and delivery were used in serving them.* Both admit that volumes and methods of sale and delivery vary greatly among the independents. The very table (Rebuttal Pretrial Order as to Bowman, Table 11) on which was based the schedule cited by appellee Bowman (p. 15, n. 26) to show "that all large independents did in fact receive [in-store customer] services regularly," clearly shows that a substantial percentage of the 30 largest independents served by the wholesale division concerned failed to receive the services for which they were assessed in Bowman's cost studies. Thus, large independents were barred by Bowman from obtaining the discounts needed to compete effectively with the chains, simply because of their independent ownership. The cost studies purporting to justify this classification are themselves based upon the same arbitrary categorization of customers. Clearly, both the discrimination and the proffered cost studies with which the record deals classified retail outlets solely on the basis of type of

* Borden suggests in the footnote on page 9 of its motion that the purchases of each of its chain customers "were approximately of the same order." The tables cited in support, however, merely compare aggregated chain volume to aggregated independent volume, with neither category broken down as to individual customers, be they chain or independent. Neither comparison gives the slightest clue to the relative position of one chain compared to another, or to any independent customer.

ownership. The validity of cost studies based upon such a classification is, contrary to Borden's contention (Motion, pp. 7–19), thus plainly presented by the record.

2. Thus, the issue now before this Court is not merely whether the particular price discriminations granted by appellees were justified by the proffered cost studies,[5] but whether any cost analysis constructed on the basis of a customer classification by ownership and providing average costs for the resulting groups can be used to justify discriminations among customers regardless of the actual costs of doing business with each. It is immaterial that cost studies constructed upon such an invalid theory might show the same justification even though costs were allocated on different bases (see Borden motion, pp. 23–25; but see Bowman Supplemental Pretrial Order dated December 23, 1957, p. 21); all such studies would be subject to the same basic defect that they rest upon an improper classification of customers. This appeal thus presents substantial issues relating to the scope of the cost justification proviso, which this Court has never directly considered. Moreover, the issues arise

[5] It is immaterial that Borden gave an additional 1½ percent discount to Schubert and several other large independents (Borden motion, p. 9). For the reason Borden gave this additional discount—a discount still far below that automatically given to all chains, regardless of their volume of purchases—was to meet the competition of other dairies (see Government Post-Trial Brief, p. 12; Borden Additional Pretrial Order dated September 19, 1957, p. 171). Thus, the granting of this extra discount in no way indicates that, apart from such a special competitive situation, Borden would not adhere to the limitations it imposes upon the discounts given to independents.

in the very factual context which led to the enactment of the Robinson Patman Act—discrimination in the grocery field in favor of the chain stores as against independents. The question is a substantial one involving an important area of business regulation, and it calls for plenary consideration by this Court.

Respectfully submitted.

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